



Senate

General Assembly

File No. 447

February Session, 2016

Substitute Senate Bill No. 403

Senate, April 4, 2016

The Committee on Banking reported through SEN. WINFIELD of the 10th Dist., Chairperson of the Committee on the part of the Senate, that the substitute bill ought to pass.

AN ACT CONCERNING FORECLOSURE BY COMMERCIAL POWER OF SALE.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

1 Section 1. (NEW) (*Effective January 1, 2017*) (a) As used in this section
2 and sections 2 to 7, inclusive, of this act, "statutory power of sale"
3 means a clause in a mortgage deed or incorporated by reference in a
4 mortgage deed granted by a corporation, partnership, including a
5 limited partnership or a limited liability partnership, or limited
6 liability company, that gives the mortgagee the power to foreclose a
7 mortgage nonjudicially. If the statutory power of sale is incorporated
8 by reference, the deed shall include notice to the mortgagor of such
9 statutory power of sale.

10 (b) The statutory power of sale shall not be used to foreclose a
11 mortgage granted by a religious corporation organized under the
12 provisions of section 33-264a of the general statutes or to foreclose a
13 mortgage that encumbers real estate containing residential units or to
14 foreclose a mortgage on real property for which the original mortgage

15 was less than five million dollars. If a mortgage deed contains a
16 statement, at the time the mortgage deed is given, that the mortgagor
17 is not a religious corporation organized under the provisions of section
18 33-264a of the general statutes, then such statement shall conclusively
19 establish the facts contained therein.

20 (c) A statutory power of sale in a mortgage deed provides for the
21 power to foreclose a mortgage nonjudicially in accordance with the
22 provisions of this section and sections 2 to 7, inclusive, of this act.
23 Upon any default in the performance or the observance of the
24 conditions on or the requirements of the mortgage deed, including, but
25 not limited to, any obligations to repay the debt that is secured by the
26 mortgage deed, and the expiration of a cure period of not less than
27 sixty days following receipt of written notice of such default, the
28 mortgagee or the mortgagee's executors, administrators, successors or
29 assigns, acting by and through a duly authorized attorney in his or her
30 capacity as a commissioner of the Superior Court admitted to practice
31 in the state, may sell, by way of a public sale, the mortgaged premises,
32 or, in the event of any partial release of such mortgage deed, the
33 portion of the mortgaged premises that remains subject to the
34 mortgage deed, either as a whole or in parcels, together with any
35 improvements to the mortgaged premises. Such public sale shall take
36 place (1) in the town where the mortgaged premises is located, (2) if
37 more than one parcel is subject to such mortgage deed, then in the
38 town where one of such parcels is located, or (3) in any other place
39 designated in the mortgage deed. Such sale of the mortgaged premises
40 or portion of the mortgaged premises shall comply with the terms of
41 the mortgage deed and the provisions of this section and sections 2 to
42 7, inclusive, of this act. The mortgagee or the mortgagee's executors,
43 administrators, successors or assigns or the agent or attorney of the
44 mortgagee or the mortgagee's executors, administrators, successors or
45 assigns may convey the mortgaged premises by proper deed or deeds
46 to the purchaser or purchasers in fee simple.

47 (d) Nothing in this section or sections 2 to 7, inclusive, of this act
48 shall prevent a mortgagee from foreclosing a mortgage deed by strict

49 foreclosure or foreclosure by sale through an action brought in
50 Superior Court and as otherwise provided by law.

51 (e) If a mortgage deed containing a statutory power of sale secures a
52 debt or other obligation that is secured by more than one mortgage
53 deed, foreclosure by statutory power of sale of one of the mortgages
54 shall not be a bar to foreclosure of any of the other mortgages by
55 statutory power of sale or by other means permitted by law.

56 Sec. 2. (NEW) (*Effective January 1, 2017*) (a) A notice of intention to
57 foreclose pursuant to a statutory power of sale under subsection (c) of
58 section 1 of this act shall be (1) in writing and contain the provisions
59 required under subsection (b) of this section, (2) served upon persons
60 described in subsection (c) of this section in the manner for service of
61 process required under chapter 896 of the general statutes or section
62 33-929 of the general statutes to commence a civil action, and (3)
63 recorded in the land records of the town in which the real property
64 subject to foreclosure by statutory power of sale is located.

65 (b) A notice of intention to foreclose pursuant to a statutory power
66 of sale shall state: (1) The property encumbered by the mortgage deed
67 to be foreclosed by statutory power of sale; (2) the default or defaults;
68 (3) the action required to cure the default or defaults; (4) a date, not
69 less than sixty days from the date notice is given to the mortgagor, by
70 which the default or defaults must be cured in order to avoid the sale;
71 and (5) whether the mortgagee has accelerated maturity of the debt or
72 the maturity date of the debt has occurred.

73 (c) Notice of the intention to foreclose pursuant to a statutory power
74 of sale shall be served on:

75 (1) The mortgagor or a representative in interest of the mortgagor as
76 designated in writing pursuant to the mortgage deed. Such notice shall
77 be sent by registered or certified mail (A) addressed to the mortgagor
78 or the mortgagor's representative at the mortgagor's last known
79 address, (B) to any person and to any address agreed upon in the
80 mortgage deed, or (C) to any address provided in writing by the

81 mortgagor to the mortgagee.

82 (2) Any tenant of the property if the mortgagee knows or should
83 know by exercise of due diligence that the property is occupied as a
84 rental unit. Upon request from a mortgagee, the mortgagor or its
85 representative in interest shall provide the name, address and other
86 contact information for any tenant. Notice to a tenant shall be served
87 on the tenant by marshal, sent by first class mail to the tenant's last-
88 known address or posted conspicuously at each entrance to the
89 mortgaged premises.

90 (3) All other parties in interest, except for parties in interest having
91 superior priority to the foreclosing mortgagee or a claim to the subject
92 property that is recorded in the land records of the town in which the
93 real property subject to foreclosure pursuant to a statutory power of
94 sale is located at the time of recording of the notice of intention to
95 foreclose by statutory power of sale. The notice shall be sent to the
96 address, if any, listed in the instrument evidencing the interest, and, if
97 none is listed, to the registered agent for the party in interest or to any
98 other address that may be readily available to the mortgagee. Failure
99 to notify any party in interest, other than the mortgagor, does not
100 invalidate the foreclosure as to other parties in interest to whom notice
101 was given.

102 Sec. 3. (NEW) (*Effective January 1, 2017*) (a) The mortgagor may cure
103 a default or defaults in the performance of the conditions or
104 requirements of a mortgage deed, avoid the operation of any
105 acceleration clause in the mortgage deed, prevent the foreclosure
106 pursuant to a statutory power of sale or other disposition of the
107 mortgaged premises and reinstate the mortgage deed by tendering the
108 payment or performance due under the mortgage deed by: (1) Paying
109 all sums that would have been due at the time of payment in the
110 absence of any acceleration clause; (2) performing any other obligation
111 the mortgagor would have been bound to perform in the absence of
112 any acceleration clause; and (3) paying the costs of the proceeding to
113 foreclose that are reasonably incurred by the mortgagee, including, but

114 not limited to, reasonable attorney's fees of the mortgagee.

115 (b) At any time after receiving notice of the default or defaults, the
116 mortgagor may waive such right to cure in writing.

117 (c) At any time up to the time of the sale under a foreclosure
118 pursuant to a statutory power of sale, the mortgagor may redeem the
119 real property from the mortgage deed being foreclosed pursuant to a
120 statutory power of sale by paying the entire indebtedness and other
121 sums due under the mortgage deed and all costs reasonably incurred
122 in connection with the proceeding to foreclose, including reasonable
123 attorney's fees of the mortgagee.

124 Sec. 4. (NEW) (*Effective January 1, 2017*) (a) The mortgagee, after the
125 mortgagor's default and upon compliance with the provisions of
126 sections 1 to 7, inclusive, of this act, may sell all or any part of the
127 mortgaged premises that is subject to the mortgage deed. A sale under
128 a foreclosure pursuant to a statutory power of sale shall convey title to
129 the property subject to all other parties in interest who have superior
130 priority to the foreclosing mortgagee or a claim to the subject property
131 that is properly recorded at the time notice has been given in
132 accordance with the provisions of subsection (c) of section 2 of this act.
133 The sale may be by public sale, as a unit or in parcels, at any time and
134 place and on any terms, including, but not limited to, sale on credit.
135 The sale shall be conducted by a commissioner of the Superior Court
136 admitted to practice in the state selected by the clerk of the judicial
137 district within which the property is located. Every aspect of the sale,
138 including the method, advertising, time, place, deposit and terms shall
139 be commercially reasonable, provided there shall be a rebuttable
140 presumption that a sale that complies with the requirements of
141 subsection (c) of this section is commercially reasonable. The
142 mortgagee shall give to persons entitled to notice under subsection (c)
143 of section 2 of this act written notice of the time and place of the sale.
144 Such notice shall be given not less than sixty days prior to the sale.
145 Such notice shall either be served in accordance with subsection (a) of
146 section 2 of this act or be delivered by both certified mail, return

147 receipt requested, and first class mail. The notice required by this
148 subsection shall be deemed given and complete upon being served in
149 accordance with subsection (a) of section 2 of this act or three days
150 after being deposited in the United States mail with postage prepaid,
151 as applicable. The sale may not be held earlier than sixty days after
152 giving the notice required by this subsection. A mortgagee may bid on
153 and purchase any real property sold at such sale, provided the
154 mortgagee is the highest bidder.

155 (b) At the time of acceptance of a bid at a public sale under this
156 section, the successful bidder, other than the foreclosing mortgagee,
157 shall pay the required deposit to the commissioner of the Superior
158 Court conducting the sale and execute and deliver to such
159 commissioner a contract to purchase the real property, which may be a
160 bond for deed. If the highest bidder fails to perform on the purchase
161 and sale agreement, the commissioner of the Superior Court
162 conducting the sale may execute a purchase and sale agreement with
163 the next highest bidder not later than thirty days after the sale and the
164 deposit of the highest bidder may be retained or recovered as
165 liquidated damages. If the foreclosing mortgagee is the highest bidder
166 or becomes the highest bidder by failure of another bidder to perform
167 a purchase and sale agreement, a purchase and sale agreement need
168 not be executed for the foreclosing mortgagee. Any sums retained or
169 recovered by the foreclosing mortgagee under this subsection shall be
170 applied to the payment of the debt secured by the mortgage deed in
171 the same manner as the proceeds of a completed sale.

172 (c) There shall be a rebuttable presumption that a sale under this
173 section is commercially reasonable if: (1) The commissioner of the
174 Superior Court appointed to conduct the sale complies with all
175 applicable requirements for notice and sale as provided in sections 1 to
176 7, inclusive, of this act; (2) notice of the sale, including the address of
177 the real property to be sold, the date, place and time of the sale, the
178 amount of the deposit required at the sale and the name and telephone
179 number of the commissioner of the Superior Court conducting the sale,
180 is posted at the location of the real property not less than sixty days

181 before the date of sale; and (3) the sale is advertised in a newspaper of
182 general circulation in the town where the real property is located, at
183 least once each week for three successive weeks before the sale, in
184 substantially the form customarily used for notices of judicial sale of
185 real property, and includes the address of the real property to be sold,
186 the date, place and time of the sale, the amount of the deposit required
187 at the sale and the name and telephone number of the commissioner of
188 the Superior Court conducting the sale. The appointed commissioner
189 of the Superior Court, after serving a notice of intention to foreclose by
190 statutory power of sale under section 2 of this act, is authorized to
191 enter upon the real property for the purpose of posting the notice of
192 sale required under this subsection.

193 (d) The commissioner shall convey title by a mortgagee statutory
194 power of sale deed as provided in the applicable contract for sale and
195 as provided in section 7 of this act.

196 (e) Before the recording of the deed conveyed pursuant to
197 subsection (d) of this section, the commissioner of the Superior Court
198 appointed to sell the real property in accordance with this section shall
199 cause to be recorded on the land records of the town in which the real
200 property subject to foreclosure by statutory power of sale is located a
201 certificate of foreclosure of mortgage pursuant to a statutory power of
202 sale containing: (1) The name of the foreclosing mortgagee by whom
203 such commissioner was appointed, the names of the original
204 mortgagor and mortgagee as stated in the mortgage deed being
205 foreclosed pursuant to the statutory power of sale, the volume and
206 page of the land records where such mortgage deed is recorded and, if
207 applicable, the parties and recording information of any assignment of
208 such mortgage deed to the foreclosing mortgagee; and (2) a statement
209 that such commissioner has complied with all applicable requirements
210 for the sale of the real property.

211 Sec. 5. (NEW) (*Effective January 1, 2017*) (a) A mortgagor or any other
212 person entitled to notice of intention to foreclose pursuant to a
213 statutory power of sale under subsection (c) of section 2 of this act may

214 apply to the Superior Court for a protective order seeking to stay,
215 enjoin or condition the terms of the sale. Such applicant shall pay to
216 the clerk of the Superior Court an entry fee of the cost of a civil action.
217 An application made under this subsection shall be scheduled for a
218 hearing by the court. The court shall order reasonable notice of the
219 date and time of the hearing to be given to all interested persons not
220 less than twelve days before the hearing. If any person entitled to such
221 notice is not a resident of this state, such notice shall be given by
222 personal service, registered or certified mail or such other method as
223 the court directs. After such hearing, the court may order that a sale of
224 real property under a foreclosure pursuant to a statutory power of
225 sale, or the disposition of the proceeds from such sale, be restrained or
226 carried out in accordance with such terms and conditions as the court
227 may determine if it is established that: (1) The underlying obligation
228 that is secured by the mortgage deed to be foreclosed pursuant to a
229 statutory power of sale is invalid; (2) the mortgagor is not in default or
230 has cured the default; or (3) the mortgagee or other person exercising a
231 statutory power of sale under section 4 of this act has not complied
232 with the provisions of sections 1 to 7, inclusive, of this act, or that there
233 exists in law any other claim or defense that can be made in a
234 foreclosure action.

235 (b) A mortgagee may apply to the Superior Court for an order in aid
236 of the mortgagee's rights under sections 1 to 7, inclusive, of this act,
237 including, but not limited to, an order allowing the mortgagee and
238 other interested persons reasonable access to the real property subject
239 to foreclosure pursuant to a statutory power of sale for purposes of
240 rehabilitation, preparation for sale, repair, maintenance, inspection,
241 posting of notice or conducting the sale. The application shall be
242 scheduled for a hearing by the court. The court shall order reasonable
243 notice of the date and time of the hearing to be given to all interested
244 persons not less than twelve days before the hearing. If any person
245 entitled to such notice is not a resident of this state, such notice shall be
246 given by personal service, registered or certified mail, publication or
247 such other method as the court directs.

248 (c) After a sale of real property under a foreclosure pursuant to a
249 statutory power of sale, a proceeding to set aside such sale may be
250 undertaken only pursuant to subsection (d) of this section. If no action
251 to set aside such sale is brought under subsection (d) of this section on
252 or before thirty days after the date of sale, the facts asserted in the
253 certification required by subsection (e) of section 4 of this act with
254 respect to such sale shall be rebuttably presumed to be true and
255 accurate.

256 (d) If the mortgagee fails to comply with the provisions of sections 1
257 to 7, inclusive, of this act, the mortgagor or any other person entitled to
258 notice of intention to foreclose pursuant to a statutory power of sale
259 under subsection (c) of section 2 of this act may seek to set aside a sale
260 of real property under a foreclosure pursuant to a statutory power of
261 sale by commencing a civil action in the Superior Court not later than
262 thirty days after the date on which such sale was held. The foreclosing
263 mortgagee and the owner of record shall be necessary parties to such
264 action and process in such action shall be served upon them not later
265 than twelve days after the date of issuance of the complaint, but not
266 later than ten days after the date of such sale. No such action may be
267 maintained unless the plaintiff causes a notice of lis pendens to be
268 recorded in the land records of the town in which the real property is
269 located not later than ten days after the date of issuance of the
270 complaint and not later than thirty days after the date of such sale. The
271 notice of lis pendens shall comply with the provisions of section 52-325
272 of the general statutes and be served on the foreclosing mortgagee, the
273 commissioner of the Superior Court appointed to conduct such sale
274 and the owner of record not later than five days after the
275 commencement of the action. Actions brought under this subsection
276 shall be privileged cases to be heard by the court as soon after the
277 return day as is practicable.

278 Sec. 6. (NEW) (*Effective January 1, 2017*) (a) The proceeds from a sale
279 of real property under a foreclosure pursuant to a statutory power of
280 sale under sections 1 to 7, inclusive, of this act shall be held by the
281 commissioner of the Superior Court conducting the sale as a trustee for

282 the benefit of the foreclosing mortgagee and all persons who may
283 claim an interest in such proceeds. Such proceeds shall be distributed
284 by such commissioner in the following order:

285 (1) The reasonable expenses of sale;

286 (2) The reasonable expenses of securing possession before sale and
287 holding, maintaining and preparing the real property for sale,
288 including, but not limited to, premiums on hazard and liability
289 insurance, and, to the extent provided for in the mortgage deed and
290 not prohibited by law, reasonable attorney's fees and other legal
291 expenses incurred by the mortgagee;

292 (3) Satisfaction of the indebtedness secured by the mortgage deed
293 being foreclosed pursuant to a statutory power of sale;

294 (4) Satisfaction in the order of priority of any subordinate interest of
295 record entitled to notice under subdivision (3) of subsection (c) of
296 section 2 of this act; and

297 (5) Remittance of any excess to the mortgagor.

298 (b) If, after distribution of the proceeds in accordance with
299 subdivisions (1), (2) and (3) of subsection (a) of this section, there
300 remain excess proceeds available for distribution to the holders of the
301 subordinate interests, distribution of such excess proceeds shall be
302 made in the following manner:

303 (1) Not later than five days after the transfer of title to the purchaser,
304 the commissioner of the Superior Court conducting the sale shall give
305 notice to all holders of such subordinate interests of record and to the
306 former owner of the real property regarding the existence and extent of
307 excess proceeds. Such notice shall list the names and addresses of all
308 such holders and shall be given by certified mail, return receipt
309 requested.

310 (2) Not later than twenty days after the date of the notice required
311 under subdivision (1) of this subsection, the former owner of the real

312 property and all holders of such subordinate interests of record
313 desiring to make a claim to the excess proceeds shall forward to the
314 commissioner of the Superior Court conducting the sale an affidavit of
315 debt setting out the priority and amount being claimed, including a
316 statement of the per diem accrual rate subsequent to the date of the
317 affidavit. Copies of the affidavit shall be mailed to the former owner of
318 the real property and to all other holders of subordinate interests listed
319 in such notice.

320 (3) Not later than ten days after the expiration of the period
321 described in subdivision (2) of this subsection, the commissioner of the
322 Superior Court conducting the sale shall prepare a statement of
323 distribution containing the proposed order of priorities and payments
324 to the former owner of the real property and to each holder of a
325 subordinate interest to whom a payment is to be made, copies of which
326 statement shall be mailed to the former owner of the real property and
327 to all holders of subordinate interests listed in the notice required
328 under subdivision (1) of this subsection.

329 (4) If, not later than ten days after the mailing of the statement of
330 distribution, neither the former owner of the real property nor the
331 holder of any such subordinate interest has given notice to the
332 commissioner of the Superior Court conducting the sale and to all
333 other holders of such subordinate interests of an objection to the
334 commissioner's proposed order of priorities and payments contained
335 in the statement of distribution, the commissioner shall forthwith make
336 payment in accordance with the statement of distribution.

337 (5) If, not later than ten days after the mailing of the statement of
338 distribution, the former owner or any holder of such a subordinate
339 interest of record gives notice to the commissioner of the Superior
340 Court conducting the sale and to all other holders of such subordinate
341 interests of an objection to the proposed order of priorities and
342 payments as contained in the statement of distribution, the
343 commissioner shall (A) make distribution only to those persons whose
344 interests are unaffected by the objection, (B) pay to the Superior Court

345 the proceeds at issue, and (C) provide notice to the former owner of
346 the real property and to all holders of such subordinate interests of
347 record, by certified mail, return receipt requested, of the address of the
348 court to which the proceeds were paid, the person's right to file an
349 application with the court for return of such proceeds and the amount
350 of proceeds paid to the court. Any such holder or the former owner of
351 the real property may, not later than ninety days after the date the
352 commissioner paid such proceeds to the court, file an application with
353 the court for return of such proceeds and a determination of the
354 equities of the parties having an interest in such proceeds. Notice of
355 such application shall be served, in the manner for service of process
356 required under chapter 896 of the general statutes or section 33-929 of
357 the general statutes to commence a civil action, upon all persons
358 having an interest of record in the real property on the date of
359 recording of the notice of intention to foreclose by statutory power of
360 sale under subsection (a) of section 2 of this act. The court, on motion
361 of a party or on its own motion, may appoint a state referee to hear the
362 facts and make a determination of the equities of the parties in such
363 proceeds. The state referee, after providing at least ten days' notice to
364 the interested parties of the time and place of hearing, shall hear the
365 applicant and any interested parties, take such testimony as the state
366 referee deems material, determine the equities of the parties in such
367 proceeds and immediately submit a report to the court. The report
368 shall contain a detailed statement of findings by the state referee that is
369 sufficient to enable the court to determine the consideration upon
370 which the state referee based his or her conclusions. The court may
371 reject the report of the state referee for any irregular or improper
372 conduct in the performance of the duties of the state referee. If the
373 report of the state referee is rejected by the court, the court shall
374 appoint another state referee to make findings and submit a report. If
375 the report of the state referee is accepted by the court, the
376 determination of the equities of the parties in such proceeds made by
377 the state referee shall be conclusive upon all parties given notice of
378 such hearing, subject to appeal to the Appellate Court. If no appeal to
379 the Appellate Court is filed within the time allowed by law, or if an

380 appeal is filed and the proceedings have terminated in a final
 381 judgment determining the amount of such proceeds due each party,
 382 the clerk of the court shall send a certified copy of a statement of
 383 compensation and of the judgment to the prevailing party or parties,
 384 as the case may be, and shall pay such party or parties the amount of
 385 such proceeds that is due. There shall be paid to the clerk of the
 386 Superior Court a fee of twenty-five dollars for such certified copy.

387 Sec. 7. (NEW) (*Effective January 1, 2017*) The commissioner of the
 388 Superior Court conducting a sale of real property under section 4 of
 389 this act shall execute a deed to the purchaser of such real property that
 390 is sufficient to convey title and that identifies the mortgage deed
 391 foreclosed by statutory power of sale and the parties to the mortgage
 392 deed, indicates the volume and page of the land records where such
 393 mortgage deed is recorded and recites that the deed is executed by the
 394 commissioner of the Superior Court conducting the sale after a default
 395 and sale under sections 1 to 7, inclusive, of this act and pursuant to the
 396 commissioner's authority to conduct the sale. The signature and title or
 397 authority of such commissioner signing the deed as grantor, together
 398 with the certificate required by subsection (e) of section 4 of this act,
 399 are sufficient proof of the facts recited in the deed and of the signer's
 400 authority to sign the deed.

This act shall take effect as follows and shall amend the following sections:		
Section 1	<i>January 1, 2017</i>	New section
Sec. 2	<i>January 1, 2017</i>	New section
Sec. 3	<i>January 1, 2017</i>	New section
Sec. 4	<i>January 1, 2017</i>	New section
Sec. 5	<i>January 1, 2017</i>	New section
Sec. 6	<i>January 1, 2017</i>	New section
Sec. 7	<i>January 1, 2017</i>	New section

Statement of Legislative Commissioners:

In Section 1(a) and Section 1(c), "and" was inserted and "and section 12-498 of the general statutes, as amended by this act" was removed for consistency with other provisions of this act; Section 1(f) was removed

to eliminate redundant language; Section 3(a) and Section 3(b) were merged and reworded to eliminate redundant language, Subsec. "(c)" was changed to Subsec. "(b)" and Subsec. "(d)" was changed to Subsec. "(c)" for consistency; in Section 4(a), "The notice of a foreclosure pursuant to a statutory power of sale shall" was replaced with "Such notice shall" and "any" was replaced with "the" to eliminate redundant language; in Section 4(b) "purchase and sale" was inserted before "agreement" for consistency with other provisions of the section, "not later than thirty days after the sale" was moved from before "the commissioner" to after "bidder" for clarity, "a" was replaced with "another", "for the foreclosing mortgage" was added after "executed" and "foreclosing" was added before "mortgagee" for consistency with other provisions of the section; in Section 5(a), "to the clerk of the Superior Court" was inserted after "shall pay" for consistency with other provisions of the section and "three hundred fifty dollars" was replaced with "the cost of a civil action" for accuracy; in Section 5(b), "placed on the short calendar for a hearing" was replaced with "scheduled for a hearing by the court" and "four" was changed to "twelve" for consistency with other provisions of the section; in Section 5(c), "of" was replaced with "after," in Section 5(d), "by" was replaced with "pursuant to a" for consistency with other provisions of this act; in Section 6(b)(3) was merged into one sentence for clarity; in Section 6(b)(5), "party or" was inserted before "parties" for consistency with other provisions of the section; and Section 8 was deleted for consistency with other provisions of this act.

BA *Joint Favorable Subst.*

The following Fiscal Impact Statement and Bill Analysis are prepared for the benefit of the members of the General Assembly, solely for purposes of information, summarization and explanation and do not represent the intent of the General Assembly or either chamber thereof for any purpose. In general, fiscal impacts are based upon a variety of informational sources, including the analyst's professional knowledge. Whenever applicable, agency data is consulted as part of the analysis, however final products do not necessarily reflect an assessment from any specific department.

OFA Fiscal Note

State Impact: None

Municipal Impact: None

Explanation

The bill creates a new foreclosure process that allows a lender to foreclose a mortgage on certain properties. These provisions concern private entities and do not result in a fiscal impact to the Department of Banking.

The bill also allows a mortgagor and mortgagee to apply to the Superior Court for an order or hearing. There is no fiscal impact to the Judicial Department as the number of orders is not anticipated to be significant enough to require additional resources. The court system disposes of over 500,000 cases annually.

The Out Years

State Impact: None

Municipal Impact: None

OLR Bill Analysis**sSB 403*****AN ACT CONCERNING FORECLOSURE BY COMMERCIAL POWER OF SALE.*****SUMMARY:**

This bill creates a new foreclosure process called “statutory power of sale,” which gives a mortgagee (lender) authority to foreclose a mortgage on certain properties without a court action.

The bill allows the mortgagee to sell the property to the highest bidder at a public auction when, among other things, (1) the mortgage is in default and (2) the default is not cured within a specified period or the cure period has expired. The cure period must be at least 60 days after the mortgagor has been notified of the mortgagee’s intention to foreclose by statutory power of sale.

This foreclosure process does not apply if the (1) property that secures the mortgage is a residential property, (2) original mortgage on the property was less than \$5 million, or (3) mortgage deed is granted by a religious corporation. A statement in the deed that the mortgagor is not a religious organization establishes that fact.

A mortgagee may only use this process if the power of sale is included in the original mortgage deed or incorporated by reference in a mortgage deed granted by a corporation or partnership, including limited partnership, limited liability partnership, or limited liability company. If the statutory power of sale is incorporated by reference, the deed must include notice to the mortgagor (borrower).

The bill:

1. establishes notice requirements, including notice to the borrower, residential tenants, and subordinate lienholders on

record;

2. requires the lender to appoint a commissioner of the Superior Court (an attorney) who must conduct the sale and it specifies where the sale may take place (see COMMENT);
3. allows the mortgagor, under certain circumstances, to stop the foreclosure sale by applying to the court for relief;
4. establishes how the court must distribute the sale proceeds and convey the title;
5. establishes a court process that allows subordinate lienholders to preserve their interests in the property (the court may appoint a state referee to hear the case); and
6. does not limit a mortgagee's right to proceed under other judicial remedies, such as foreclosure by sale or strict foreclosure (see BACKGROUND).

EFFECTIVE DATE: January 1, 2017

§ 1 — NONJUDICIAL SALE

Mortgagee's Authority

The bill, gives the mortgagee or its executors, administrators, successors, or assigns, acting by and through an authorized state-licensed attorney, under specified circumstances, to sell the mortgaged property and any improvements on it, at a public auction. This also applies to any portion of the property that is still subject to the mortgage. They may do so when the mortgagor defaults on the mortgage and fails to cure the default within a specified period after receiving notice of the default. The cure period must be at least 60 days.

When a property secures more than one mortgage, foreclosure by statutory power of sale of one mortgage does not bar the foreclosure of any other mortgage as allowed by this bill or by law.

Public Auction

The public sale must take place in the place designated by the mortgage deed or in the town where (1) the mortgaged property is located or (2) one parcel of property is located, if more than one parcel is subject to the mortgage (see COMMENT). The sale must comply with the terms of the deed and the provisions of the bill. The property may be conveyed to the purchaser by proper deed or deeds or in fee simple (i.e., full ownership).

§ 2 — NOTICE REQUIREMENTS**Notice Format and Content**

A notice of intention to foreclose a property by statutory power of sale must be (1) in writing and (2) recorded in the land records of the town where the property is located.

The notice must indicate:

1. the property to be foreclosed by statutory power of sale;
2. the default or defaults;
3. the action required to cure the default or defaults;
4. a date by which the default or defaults must be cured in order to avoid the sale, at least 60 days from the date the mortgagor is given the notice; and
5. whether the debt's maturity date has occurred or the mortgagee has accelerated such date.

Notice to The Mortgagor

The notice must be served on the mortgagor or the mortgagor's representative designated in the deed.

It must be sent by registered or certified mail to:

1. the last known address of the mortgagor or the mortgagor's representative,

2. to any person and to any address agreed upon in the mortgage deed, or
3. to any address provided in writing by the mortgagor.

The notice must be served by a proper officer or other authorized person consistent with exiting law's requirements for starting a civil action.

Notice to Tenants

Notice must be served on any tenant, if the mortgagee knows, or should know by exercising due diligence, that the property is occupied as a rental unit. If the mortgagee requests, the mortgagor or the mortgagor's representative must provide the tenants' name, address and other contact information.

Notice to a tenant must be served in-person by a marshal, sent by first class mail to the tenant's last known address, or posted conspicuously at each entrance to the mortgaged property.

Notice to Other Parties in Interest

Notice must be served on all other parties in interest, except for those with superior priority to the foreclosing mortgagee or a claim to the property recorded in the land records of the town in which the property is located at the time of the notice.

The notice must be sent to the address, if any, listed in the document that proves the interest, and, if none is listed, to the party's registered agent, or to any other address that may be readily available to the mortgagee. If the mortgagee fails to notify any party of interest, other than the mortgagor, the foreclosure is still valid regarding the parties who were notified.

§ 3 — AVOIDING FORECLOSURE BY STATUTORY POWER OF SALE

Curing The Default

The mortgagor may cure a default or defaults, prevent the

foreclosure by statutory power of sale or other disposition, and thereby reinstate the mortgage deed.

The mortgagor may cure the default or defaults and avoid the operation of any acceleration clause in the mortgage deed by:

1. paying all sums that would have been due at the time of payment in the absence of any acceleration clause;
2. performing the conditions and requirements of the mortgage deed; and
3. paying all reasonable costs incurred in connection with the foreclosure proceeding, including the mortgagee's reasonable attorney's fees.

The mortgagor, at any time after receiving written notice of the default or defaults, may waive the right to cure.

Payment in Full

At any time up to the time of the sale, the mortgagor may redeem the property from the mortgage deed by paying the debt in full, any other amounts due under the mortgage, and all reasonable costs incurred in connection with the foreclosure proceeding, including the mortgagee's reasonable attorney's fees.

§ 4 — SALE OF THE PROPERTY

The mortgagee may sell all or any part of the mortgaged premises that is subject to the mortgage deed, after there has been a default and in compliance with the bill's provisions. The mortgagee may do so after there has been a default and title must be conveyed to all parties in interest who (1) have superior priority to the foreclosing mortgagee or (2) a properly recorded claim at the time the required notice was given.

The sale may be by public sale, as a unit or in parcels, at any time and place and on any terms (see COMMENT). It must be conducted by a state-licensed attorney, who is selected by the clerk of the judicial

district in which the property is located.

All aspects of the sale, including the method, advertising, time, place, deposit, and terms, must be commercially reasonable (see below). There is a rebuttable presumption that a sale that complies with the provisions of the bill is commercially reasonable.

Sale Notice

The mortgagee must give written notice of the time and place of the sale to the mortgagor or the mortgagor's representative and all other persons that are required to be notified of the mortgagee's intention to foreclose, in the same manner and with the same content as the notice of intention to foreclose. The sale may not occur any sooner than 60 days after the required notice of intention to foreclose has been given.

The notice of the sale must be served in accordance with the requirements for serving the notice of intention to foreclose or be delivered by both certified mail, return receipt requested, and first class mail. Notice of the sale is deemed given and complete upon being properly served in accordance with requirements of the bill or three days after being deposited in the United States mail with postage prepaid.

Bidding

A mortgagee may bid on and purchase any real property sold at the public sale, provided the mortgagee is the highest bidder.

At the time of acceptance of a bid, the successful bidder, other than the foreclosing mortgagee, must pay the required deposit to the attorney conducting the sale and execute and deliver to such attorney a contract to purchase the property, which may be a bond for deed. If the highest bidder fails to perform on the purchase and sale agreement, within 30 days after the sale date, the attorney conducting the sale may execute a purchase and sale agreement with the next highest bidder. The highest bidder's deposit may be retained or recovered as liquidated damages. Any such amounts must be applied to the payment of the debt secured by the mortgage deed in the same

manner as the proceeds of a completed sale.

A purchase and sale agreement is not needed if the foreclosing mortgagee is the highest bidder or becomes the highest bidder by failure of a bidder to perform under an agreement.

“Commercially Reasonable” Rebuttable Presumption

There is a rebuttable presumption that a sale is commercially reasonable if:

1. the attorney appointed to conduct the sale complies with all applicable requirements for notice and sale;
2. notice of the sale, including the address of the real property to be sold, the date, place and time of the sale, the amount of the deposit required at the sale and the name and telephone number of the attorney conducting the sale, is posted at the location of the real property at least 60 days before the date of sale; and
3. the sale is advertised in a newspaper of general circulation in the town where the real property is located, at least once each week for three successive weeks before the sale, in substantially the form customarily used for notices of judicial sale of real property and includes the address of the real property to be sold, the date, place and time of the sale, the amount of the deposit required at the sale and the name and telephone number of the attorney conducting the sale.

The attorney appointed to conduct the sale is authorized to enter the property to post the notice of sale, but may not do so until after notice of the intention to foreclose has been served in accordance with the bill.

Conveyance of Title and Recording of Deed

The attorney appointed to conduct the sale must convey title by a mortgagee statutory power of sale deed as provided in the applicable

contract for sale and as provided in the bill (see below).

Before the recording of the deed conveyed, the attorney appointed to sell the property must record on the land records of the town in which the property is located, a certificate of foreclosure of mortgage pursuant to a statutory power of sale containing:

1. the name of the foreclosing mortgagee by whom the attorney was appointed, the names of the original mortgagor and mortgagee as stated in the mortgage deed being foreclosed;
2. the volume and page of the land records where such mortgage deed is recorded, and, if applicable, the parties and recording information of any assignment of such mortgage deed to the foreclosing mortgagee; and
3. a statement that the attorney has complied with all applicable requirements for the sale of the property.

§ 5 — JUDICIAL RELIEF

Mortgagor's Petition to Stop The Sale

A mortgagor or any other person entitled to notice of intention to foreclose by statutory power of sale may apply to the Superior Court for a protective order seeking to stay, enjoin, or condition the terms of the sale. The applicant must pay the court clerk the cost of a civil action.

The court must schedule a hearing and order reasonable notice of the hearing's date and time. Anyone who is entitled to notice but lives out of state, must be served notice in person or by registered or certified mail or any other method the court orders. Notice must be served to all interested parties at least 12 days before the hearing.

After the hearing, the court may order that the sale of property or the disposition of the proceeds from such sale, be restrained or carried out according to terms and conditions as the court may determine. (It is not clear what it means to "restrain" the sale or proceeds

disposition.) The court must find that the:

1. underlying obligation that is secured by the mortgage deed to be foreclosed is invalid;
2. mortgagor is not in default or has cured the default; or
3. mortgagee or other person exercising a statutory power of sale has not complied with the provisions of the bill, or that there exists in law any other claim or defense that can be made in a foreclosure action.

Mortgagee's Petition For Access to The Property

A mortgagee may apply to the Superior Court for an order in support of the mortgagee's rights under the bill, including, an order allowing the mortgagee and other interested persons reasonable access to the property for rehabilitation, repair, maintenance, inspection, posting of notice, or conducting the sale.

The court must order reasonable notice of the date and time of the hearing be given to all interested persons at least 12 days before the hearing. If any person entitled to such notice is not a resident of the state, the notice must be served in person or by registered or certified mail, publication, or other method as ordered by the court.

Civil Action to Set Aside Sale

After the sale of the property under a foreclosure by statutory power of sale, a proceeding to set aside such sale may be pursued in court. If no such action is brought on or before 30 days after the date of sale, the facts asserted in the certificate of foreclosure must be reputably presumed to be true and accurate.

If the mortgagee fails to comply with the provisions of the bill, the mortgagor or any other person entitled to notice of intention to foreclose may seek to set aside the sale of the property by bringing a civil action by 30 days after the date of the sale. The foreclosing mortgagee and the owner of record are necessary parties to such action

and they must be served notice not later than 12 days after the date on which the complaint was issued, but not later than 10 days after the date of the sale.

The plaintiff must have a notice of lis pendens recorded in the land records of the town in which the property is located not later than 10 days after the complaint was issued and not later than 30 days after the sale date. The notice of lis pendens must comply with the law and be served on the foreclosing mortgagee, the attorney appointed to conduct the sale, and the owner of record, by five days after the start of the action. Set aside actions are privileged cases and must be heard by the court as soon as practicable after the return date (i.e., date by which action must be taken).

§ 6 — DISTRIBUTION OF SALE PROCEEDS

Order of Distribution

The proceeds from a sale of real property under a foreclosure by statutory power of sale must be held by the attorney who conducted the sale as a trustee for the benefit of the foreclosing mortgagee and all persons who may claim an interest in such proceeds.

The proceeds shall be distributed by such attorney as follows:

1. the reasonable expenses of sale;
2. the reasonable expenses of securing possession before sale and holding, maintaining, and preparing the property for sale, including, hazard and liability insurance premiums, and, to the extent provided for in the mortgage deed and not prohibited by law, reasonable attorney's fees and other legal expenses incurred by the mortgagee;
3. debts secured by the mortgage deed being foreclosed;
4. satisfaction in the order of priority of any subordinate interested persons who were entitled to notice; and
5. remittance of any excess to the mortgagor.

Distribution of Excess Proceeds to Subordinate Interests

If proceeds are available for distribution to the holders of the subordinate interests, distribution of such excess proceeds must be carried out in the order described below.

Notice of Excess Proceeds. Not later than five days after the transfer of title to the purchaser, the attorney conducting the sale must give notice to all subordinate interest holders of record and to the former owner of the property regarding the existence and extent of excess proceeds. The notice must (1) list the names and addresses of all such holders and (2) be given by certified mail, return receipt requested.

Affidavit of Debt. Not later than 20 days after the date of the notice of excess proceeds has been received, the former owner of the property and all subordinate interest holders of record who want to make a claim, must send an affidavit of debt to the attorney who conducted the sale. The affidavit must set out the priority and amount being claimed, including a statement of the per diem accrual rate after the date of the affidavit.

Copies of the affidavit must be mailed to the former owner of the property and to all other holders of subordinate interests listed in such notice (Presumably this refers to the notice of excess proceeds.).

Statement of Distribution. Not later than 10 days after the expiration of the period within which the affidavit must be submitted, the attorney conducting the sale must prepare a statement of distribution containing the proposed order of priorities and payments to the former owner of the real property and to each holder of a subordinate interest to whom a payment is to be made.

Copies of the statement of distribution must be mailed to the former owner of the real property and to all holders of subordinate interests listed in the notice of excess proceeds.

Payment If No Objection. If, by 10 days after the mailing of the

statement of distribution, the former owner of the real property and no subordinate interest holder object to the proposed order of priorities and payments contained in the statement of distribution, the attorney must make payment in accordance with the statement of distribution. The objection must be sent to the attorney conducting the sale and to all other subordinate interest holders.

Objection to Payment. If, within 10 days after the mailing of the statement of distribution, the former owner or any subordinate interest holder notifies the attorney conducting the sale and all other subordinate interest holders of an objection to the proposed order of priorities and payments as contained in the statement of distribution, the attorney must:

1. make distribution only to those persons whose interests are not affected by the objection;
2. pay the proceeds at issue to the Superior Court; and
3. notify the former owner and all subordinate interest holders of record, by certified mail, return receipt requested, of the address of the court to which the proceeds were paid, the person's right to file an application with the court for return of such proceeds, and the amount of proceeds paid to the court.

Any such holder or the former owner of the real property may, within 90 days after the date the proceeds are paid to the court, file an application with the court for return of such proceeds and a determination of the equities of the parties having an interest in such proceeds. Notice of such application must be served, in the manner for service of process to begin a civil action, upon all persons having an interest of record in the property on the date of recording of the notice of intention to foreclose by statutory power of sale.

Appointment of State Referee. The court, on the motion of a party or on its own motion, may appoint a state referee to hear the facts and to make a determination of the equities of the parties in the proceeds.

The state referee must hear the case after providing at least 10 days' notice to the interested parties of the time and place of the hearing. The referee must hear any testimony he or she deems material, determine the equities of the parties in the proceeds, and immediately submit a report to the court.

The report must contain a detailed statement of the state referee's findings that is sufficient to enable the court to determine the consideration upon which the state referee based his or her conclusions. The court may reject the referee's report of the state referee for any irregular or improper conduct in the performance of the duties of the state referee. If the court rejects the first state referee's report, it must appoint another state referee to make findings and submit a report.

Appeal. If the report is accepted by the court, the state referee's determination of the equities of the parties in the proceeds must be conclusive upon all parties given notice of such hearing, subject to appeal to the Appellate Court.

If no appeal to the Appellate Court is filed within the time allowed by law, or if an appeal is filed and the proceedings have terminated in a final judgment determining the amount of such proceeds due each party, the court clerk must send a certified copy of a statement of compensation and of the judgment to the prevailing party or parties, as the case may be, and must pay such parties the amount of such proceeds that is due. The court fee for a certified copy is \$25.

§ 7 — EXECUTION OF DEED

The attorney conducting the sale, must (1) execute a deed to the purchaser that is sufficient to convey title and that identifies the mortgage deed foreclosed by statutory power of sale and the parties to the mortgage deed, (2) indicate the volume and page of the land records where such mortgage deed is recorded and (3) recite that the deed is executed by the attorney conducting the sale after a default and sale by statutory power of sale pursuant to attorney's authority to

conduct the sale.

The signature and title or authority of the attorney signing the deed as grantor, together with the certificate of foreclosure are sufficient proof of the facts recited in the deed and of the signer's authority to sign the deed.

BACKGROUND

Foreclosure by Sale

With a judgment of sale, the court (1) establishes the time and manner of the sale, (2) appoints a committee to sell the property, and (3) appoints three appraisers to determine its value. The borrower may stop the foreclosure proceedings at any time before the sale by paying the balance due on the mortgage. If no such payment is made, the committee must go forward with the sale. The lender may sue to obtain a deficiency judgment (an order for the borrower to repay any remaining mortgage balance).

Strict Foreclosure

With strict foreclosure, no actual foreclosure sale is held. Instead, the lender goes to court to try and obtain a court order demonstrating the borrower is in default of the mortgage. If successful, the title transfers to the lender immediately. However, the court sets an amount of time in which the borrower may redeem the property, but if he or she fails to do so, the title becomes absolute to the lender and the borrower no longer has any claim to the property. The lender then has 30 days to record a certificate of foreclosure, which must contain a description of the property, the foreclosure proceedings, and the mortgage along with the date the title became absolute.

COMMENT

The bill has conflicting provisions regarding the sale location. It allows the public sale to be held in any location, yet also limits the sale location to specific places.

COMMITTEE ACTION

Banking Committee

Joint Favorable Substitute

Yea 15 Nay 3 (03/15/2016)